IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1256 OF 2005

Malgonda Basgonda Patil & Anr. ...Appellants

Vs.

Shivgonda Bharamgonda Patil & Ors. ...Respondents

Mr.G.N.Salunke for the Appellants
Mr.V.S.Kokitkar for the Respondent No.1.

CORAM: A.S.OKA, J.
DATED: APRIL 13,2006.

P.C.:

1. Heard learned Advocates for the parties. Second Appeal is by the original Defendant Nos.2 and 3. The Trial Court passed a decree declaring that the will executed by one Ahilyabai in favour of the Appellants was null and void and was not binding on the Respondent No.1-original Plaintiff. However, the relief of perpetual injunction was denied to the Respondent No.1. Counter claim filed by the Appellants was dismissed. An Appeal was preferred by the Appellants herein and original Defendant No.1 to the First Appellate Court which has been dismissed. The finding of the District Court is that the Appellants could not prove the execution of the will executed by the said Ahilyabai as the attesting witnesses were not examined. The Appellate Court observed that an Affidavit of evidence of one attesting witness was filed. However, the said witness never made himself

available for cross examination. As the execution of the will was not proved, decree passed by the trial court was confirmed by the Appellate Court.

2. The learned Advocate for the Appellants submitted that during the course of hearing of Appeal a specific request was made for remanding the Appeal to the Trial Court to enable the Appellants to produce the attesting witness for cross examination by the Advocate of the Respondent No.1-Plaintiff. He submitted that the evidence on record shows that the attesting witness who filed the affidavit could not appear for cross examination before the Court as he was bed ridden. He submitted that the Appellate court ought to have taken liberal view and remanded the matter to the Trial court. He submitted that as the attesting witness was not available Section 69 of the Indian Evidence Act, 1872 ought to have been invoked.

3. I have considered the submissions. There is nothing on record to show that the Appellants had made any effort to secure presence of the said attesting witness by applying for witness summons. No attempt was made by the Appellants to examine the attesting witness on commission assuming that the attesting witness was bed ridden. The suit was dismissed on 25th April 2003 and the Appeal was filed on 13th June 2003. Till the date of hearing of the Appeal, no application was

made under Order 41 Rule 27 of the Code of Civil Procedure,1908. At the time of hearing of the Appeal, oral plea was made for remand. In my view the Appellate Court was justified in refusing the request for remand. This was not the case where during the pendency of the suit Appellants made any efforts by practising due diligence to procure the attesting witness for cross examination by the Respondent No.1. There is no error in refusing the request made by the Appellants for passing the order of remand. The attesting witness was very much available. The attesting witness could have been examined by appointing Commissioner.

4. In view of this position, no fault can be found with the finding recorded that the Appellants have failed to prove the execution of the will. No substantial question of law arises. Second Appeal is dismissed with no order as to costs.

Judge.